ALEX TING KUANG KUO

v.

CREDIT CORPORATION (MALAYSIA) BHD

HIGH COURT MALAYA, KUALA LUMPUR
BADARIAH SAHAMID JC
[SUIT NO: D3-22-231-2001]
19 AUGUST 2008

BANKING: *Banker and customer - Duty of care when bank is paying out monies - Transfer of funds to third party upon instructions of customer - Bank bound to comply with customer's instructions - Implied term that bank will observe reasonable skill and care in executing customer's orders - Whether customer obliged to repay bank sums paid out without mandate*

BANKING: *Banks and banking business - Loan facilities - Disbursement of loan - Payment by bank to housing developer under loan facilities - Whether incumbent on banker to make site visit to verify status of project before disbursement - Whether architect's certificate is sufficient proof of stage of completion - Whether banker may proceed to disburse payment despite breach of sale and purchase agreement by developer - Whether banker's duty to pay developer is conditional upon developer's compliance with terms of sale and purchase agreement*

LAND LAW: *Housing developers - Breach of building contract - Whether banker may disburse loan releases to developer despite breach of sale and purchase agreement by developer - Whether banker's duty to pay developer is conditional upon developer's compliance with terms of sale and purchase agreement*

By a sale and purchase agreement dated 29 May 1984 ('S & P'), the plaintiff purchased a property ('the property') from the developer for a sum of RM367,500. Subsequently, the plaintiff obtained a loan from the defendant for a sum of RM257,000. On 20 November 1986, nine days before the developer was obliged to deliver vacant possession of the property to the plaintiff, the developer issued a notice to the defendant requesting payment of RM73,250 being the first drawdown of the housing loan for item (c) of the Schedule of Payments *viz.* on commencement of reinforced concrete framework of the premises. This indicated that the stage of completion of works on the property to be between 25% and 40%. On 28 November 1986, the day before the

A scheduled date of delivery of vacant possession, the plaintiff sent a telex to the defendant requesting the defendant to withhold the release of any payment to the developer as the developer had delayed the completion of the property. The defendant nevertheless went ahead to make payment of RM73,250 on 19 B December 1986 to the developer. Subsequently, on two further occasions, on 23 March 1987 and 7 May 1987 the developer issued notices of progress payments to the defendant. The defendant withheld both payments on the basis of an indemnity from the plaintiff to the defendant. The housing project was C abandoned in June 1987. Subsequently, the defendant demanded repayment of the loan sums and the plaintiff refused to pay. The defendant then terminated the plaintiff's licence to occupy the property.

D The plaintiff therefore claimed for declarations that, *inter alia*, (i) the assignment was terminated as a result of the defendant unlawfully terminating the licence and (ii) no monies were due and owing by the plaintiff to the defendant.

E **Held (allowing the plaintiff's claim):**

(1) The defendant's payment to the developer in the sum of RM73,250 on 19 December 1986 was in breach of the express terms of the loan agreement between the plaintiff and the defendant. The defendant at the time payment was made F was aware first, that it was after the expiry of the date of vacant possession and second, there was clear documentary evidence that the developer was in breach of the S & P. (paras 41 & 43)

G **(2)** The defendant's duty to make payment to the developer is not absolute in that every demand from the developer must be complied with, but rather conditional on the demand being made in the amount and at times specified in the sale agreement. (para 46)

H **(3)** A bank in transferring funds to a third party on the instructions of his customer is bound to comply with the instructions of its customer. It is an implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care in and about executing I customer's orders. (paras 51 & 52)

(4) When the defendant made payment to the developer on 19 December 1986, the defendant was acting in the capacity of an agent of the plaintiff and was clearly under an obligation to act in accordance with the instructions of the plaintiff. Thus when the defendant made payment to the developer contrary to the express terms of the agreement as well as the written instructions of the plaintiff, the payment was made without mandate. (para 53)

(5) It is not incumbent on the defendant to make a site visit to verify the status of the project. The architect's certificate that accompanies the developer's demand for payment is sufficient proof of the stage of completion, without a need to make a site visit for verification. (para 58)

(6) Since the defendant's claim against the plaintiff was in respect of sums paid out without mandate, there was no obligation on the plaintiff to repay. Thus the plaintiff could not be regarded as being in default. Therefore, the plaintiff's notice of termination of licence amounted to a repudiation of the Deed of Assignment. Consequentially, legal and beneficial title of the property reverted to the plaintiff. (para 61)

Case(s) referred to:

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2006] 3 CLJ 1 FC ***(refd)***

Bangkok Bank Bhd v. Chuan Kee Company Sdn Bhd [2000] 1 CLJ 766 HC ***(refd)***

Burnett v. Westminster Bank Ltd [1966] 1 QB 742 ***(refd)***

Citibank NA v. Ooi Boon Leong & Ors [1980] 1 LNS 168 FC ***(refd)***

Hoo See Sen & Anor v. Public Bank & Anor [1988] 1 CLJ 768; [1988] 1 CLJ (Rep) 125 ***(refd)***

Joachimson v. Swiss Bank Corporation [1921] 3 KB 110 ***(refd)***

Libyan Arab Foreign Bank v. Bankers Trust Co [1988] 1 Lloyd's Rep 259 ***(refd)***

London Joint Stock Bank Ltd v. Macmillan & Arthur [1918] AC 777 ***(refd)***

Tai Hing Cotton Mill v. Liu Chong Hing Bank Ltd [1986] AC 80 ***(refd)***

For the defendant - SN Thevar; M/s Lee & Lim
For the plaintiff - KF Eow; M/s Skrine

Reported by Amutha Suppayah

A

JUDGMENT

Badariah Sahamid JC:

Background Facts

B **[1]** The plaintiff is the purchaser of a property. The defendant, was at all material times a company in the business of provision of finance under the Banking and Financial Institutions Act, 1989. By a sale and purchase agreement dated 29 May 1984 ("S & P"), the plaintiff purchased a property known as Hibiscus Unit No.
C H-13B, Level 5, Taman Kelab Ukay, Kuala Lumpur (hereinafter referred to as 'the property') from the Ukay Lake Holdings Sdn. Bhd. (formerly known as Lipkland Sdn. Bhd, ("the Developers") for a sum of RM367,500.

D **[2]** Relevant clauses of the S & P are as follows:

Section 4.02 Payment on execution of agreement

The purchaser has prior to the execution of this agreement paid to the developer the sum of Ringgit 36,750 upon the execution of
E this agreement being ten per centum (10%) of the purchase price as provided in the schedule of payments annexed hereto.

Section 4.03 Balance of Purchase Price

The balance of the purchase price shall be paid by the purchaser
F to the developer by installments of such amounts and at such times as are set out in the schedule of payments annexed hereto. Every notice requesting for payment shall be supported by the requisite certificate of the developer's architect or engineer and shall be accepted by the purchaser without objection or enquiry as conclusive of the fact that the works therein referred to have
G been commenced.

Section 4.04 Time

Time shall be of the essence of the contract in relation to all the provisions of this agreement particularly those which relate to the
H payment of any installment of the purchase price or any part thereof and the payment of all monies due by the purchaser to the developer under this agreement.

Section 5.36 Time for payment and interests

I The sums and moneys referred to in ss. 4.03, 5.01, 5.02 and 5.35 hereof shall be paid by the purchaser within fourteen (14) days from the date of a notice from the developer to the

purchaser requesting for such payment and if the purchaser shall for any reasons whatsoever fail neglect and or refuse to pay such sums or moneys within the period stipulated above or such grace period allowed by the developer at its absolute discretion the Purchaser shall pay to the developer interest on such unpaid sums or moneys at the rate of one per cent (1%) per month or at the rate charged by the developer's bankers for overdraft facilities granted to the developer whichever of such rates is the higher and to be calculated from day to day as from the date such payment is due until the date of payment of such sums or moneys with interest thereon Provided Always that nothing herein contained shall prejudice the rights of the developer under s. 8.01 hereof.

Section 6.07 Completion of Premises

Subject to s. 11.08 hereof and/or to any extension of time as may allowed by the developer's architect and provided always that the purchaser shall have paid to the developer all installments and moneys payable under this agreement and when they become due and shall not have made or requested the developer to make any alterations whatsoever to the premises the premises shall be completed and ready for delivery of possession to the purchaser at a date (hereinafter referred to as "such date") which shall not be later than thirty (30) calendar months from the date of this agreement and if the premises is not completed and ready for delivery of possession of the purchaser by such date the developer shall pay to the purchaser agreed liquidated damages calculated from day to day at the rate of eight per centum (8%) per annum on the purchase price of the premises from such date to the date the premises is completed and ready for delivery of possession to the purchaser.

[3] Annexed to the above agreement is the following schedule of payments:

Schedule of Payments

Particulars	Percentage
(a) Upon execution of this Agreement	10%
(b) On commencement of foundation work of that part of the Complex comprising the premises	15%
(c) On commencement of reinforced concrete framework of that part of the Complex comprising the premises	15%

(d)	On commencement of reinforced concrete framework of the premises	10%
(e)	On commencement of brick walls of the premises	15%
(f)	On commencement of roofing/ceiling and internal plastering of the premises	15%
(g)	On commencement of electrical wiring and plumbing without fittings) of the premises.	10%
(h)	On delivery of vacant possession of the Premises of the purchaser	10%
	TOTAL	100%

[4] Subsequently, the plaintiff obtained a loan from the defendants for a sum of RM257,000. The agreements executed between the plaintiff and the defendants in relation to the loan comprised the following:

(i) Loan agreement dated 18 February 1985 ("the loan agreement");

(ii) Deed of assignment dated 18 February 1985; ("the assignment")

[5] Relevant clauses in the loan agreement are reproduced below:

> [In the abovementioned agreement, the plaintiff is referred to as the "borrower" and the defendants as the "lender". The Developers are referred to as the "vendor"].
>
> **Housing Loan**
>
> *Clause 1.2*
>
> The lender shall release the housing Loan to the borrower(s) or to the vendor at such amounts and times as the lender may reasonably deem fit. Notwithstanding that there is a dispute between the borrower(s) and the vendor for the purpose of this clause the borrower(s) hereby give(s) his/her/their express consent to the Lender to release the housing loan to the vendor in the manner and at the times specified in the sale agreement.

Rate of Interest

Clause 3.2

Interest payable between the date on which the full amount of the housing loan shall have been advanced to or paid on behalf of the borrower(s) as aforesaid and 31st day of December next following shall be calculated on the full amount of the housing loan and all other sums then payable by the borrower(s).

Repayment

Clause 4.1

The borrower(s) shall repay the housing loan with interest thereon at the prescribed rate by the number of equal monthly installments indicated in Column VI of the schedule hereto or otherwise at the lender's discretion the first of such installments to be paid on the first day of the month following the complete release of housing loan or at such other date as the lender in its absolute discretion shall decide and each subsequent installment shall be paid on the first day of every consecutive month until the whole of the housing loan and interest thereon shall be fully paid and satisfied.

Clause 5.36

The sums and moneys referred to in ss. 4.03, 5.01, 5.02 and 5.35 hereof shall be paid by the purchaser within fourteen (14) days from the date of a notice from the developer to the purchaser requesting for such payment and if the purchaser shall for any reasons whatsoever fail neglect and or refuse to pay such sums or moneys within the period stipulated above or such grace period allowed by the developer at its absolute discretion the Purchaser shall pay to the developer interest on such unpaid sums or moneys at the rate of one per cent (1%) per month.

[6] Relevant clauses in the assignment are as follows:

Clause 1

In consideration of the loan the assignor(s) (the plaintiff) hereby Assign(s) to the lender (the defendant) the said property and the full and entire benefit of the sale agreement together with all rights and interests of the assignor(s) therein. Notwithstanding this assignment hereinbefore contained or any other provision of this agreement the assignor(s) shall and hereby undertake(s) to pay all and any balance of the purchase money or other moneys payable under the provisions of the sale agreement and to continue to observe perform and be bound by all whatsoever conditions covenants and stipulations therein on the part of the assignor(s) expressed and contained.

Clause 2

In the event that the assignor(s) shall:

(1) make default in the payment to the lender under the loan or interest as provided for under the loan agreement; or

(2) fail to observe or perform any of the agreements covenants stipulations terms and conditions on the part of the assignor(s) herein or in the loan agreement contained; or

(3) become bankrupt or enter into any composition or arrangement with or for the benefit of his/her/their creditors or allow any judgment against him/her/them to remain unsatisfied for a period of fourteen (14) days; or

(4) commit any act of bankruptcy; or

(5) die; or

(6) leave Malaysia for a continuous period of three (3) months; or

(7) allow any order for the compulsory acquisition of the said property or any part thereof to be made and confirmed under or by virtue of an Act Ordinance Enactment or other statutory provision or regulation;

then and in any of such cases cl. 3 hereof shall come into effect.

Clause 3

Upon default in the manner in cl. 2 hereinbefore provided the Lender shall be entitled to exercise all or any of the rights and powers following:

(1) the right to take possession of the said property or any part or parts thereof;

(2) the right to let lease or demise the said property or any part or parts thereof for such tenancy or term of years at such rent and generally upon such terms as the lender in its absolute discretion shall think fit.

(3) the right and power to sell and assign the said property as the beneficial owner thereof at such price or prices and in such manner as the lender shall in its absolute discretion think fit free from any interest of the assignor(s) hereunder or otherwise and to apply the proceeds of sale in or towards the satisfaction of the loan given inclusive of interest and all costs of and occasioned by such sale or sales shall be borne

by the assignor(s) and the lender shall only pay to the assignor(s) the balance of the proceeds of such sale or sales after deduction of such principal and interest and other moneys aforesaid and all the costs of and occasioned by such sale or sales;

AND the assignor(s) shall and hereby expressly agree(s) covenant(s) and undertake(s) to do and execute all acts deeds instruments and things which the lender may require or stipulate for the purposes of effecting and or completing anything and or any transaction mentioned in this clause.

[7] Between 8 April 1984 and 9 July 1985, the plaintiff paid a sum of RM110,500 to the developers being the difference between the purchase price of the property and the loan amount.

[8] On 20 November 1986, nine days before the developers were obliged to deliver vacant possession of the property to the plaintiff, the developers issued a notice to the defendants requesting payment of RM73,250 being the first drawdown of the housing loan. (exh. D27). A certificate attached to the notice stated that the first drawdown of the loan was intended to pay the developers item (c) of the schedule of payments (hereinafter referred to as "the schedule") *viz*. on commencement of reinforced concrete framework of the premises. This indicated that the stage of completion of works on the property to be between 25% and 40%. On 25 November 1986, the plaintiff received a copy of the abovementioned letter from the developers.

[9] On 28 November 1986, the day before the scheduled date of delivery of vacant possession, the plaintiff sent a telex to the defendants requesting the defendants to withhold the release of any payment to the developers as the developers had delayed the completion of the property. (exh. P3) The contents of the telex are as follows:

Kindly stop payment until I receive satisfactory reason/ compensation for long delay in progress. In fact the last letter I received from Lipkland was 11.12.1985

[10] Under s. 6.07 of the S & P, the developers were obliged to complete the construction of the property and deliver vacant possession of the property to the plaintiff within 30 months of the date of the S & P ie, on or before 29 November 1986, failing which the developers would pay the plaintiff liquidated damages

A calculated from day to day at the rate of 8% per annum on the purchase price from such date to the date the property is completed and ready for delivery of possession to the plaintiff.

[11] This was followed by a letter dated 5 December 1986 from
B M/s Tiong, Lim, Wong & Co (solicitors of the plaintiff) to the developers stating *inter alia* that the breach by the developer entitled the plaintiff to terminate the S & P. In the letter it was stated:

> C We are also instructed to elaborate further on our client's telex and to remind you that you should have completed the "premises" ie, Unit No. H 13-B ON 28.11.1986, not just the foundation or the framework. Our client was never given notice that you need extension of time to complete. Therefore you are in a fundamental breach of the contract.

D

[12] A copy of the letter was sent to the defendants. (exh. P4)

[13] The defendants nevertheless went ahead to make payment of RM73,250 on or about 19 December 1986 to the developers.

E **[14]** More than a month after the plaintiff's telex, by a letter dated 29 December 1986, the defendants informed the plaintiff that they were unable to entertain the plaintiff's request to withhold payment to the developers as they would only consider the plaintiff's request if the developers had breached the S & P.
F (exh. P5). Relevant parts of the defendant's letter is reproduced as follows:

> We regret to advise we are unable to accommodate your request to withhold progress payment releases. We can only consider if the developer is in breach of the Sale and Purchase Agreement.
>
> G
>
> In the case of the developer being slow in their progress development, this does not constitute a reason for withholding payments. If the developer is late for delivery of possession of the premises to the purchasers, the latter is entitled to liquidate damages calculated from day to day at the rate of 8% per annum
> H on the purchase price of the premises from such date to date of premises is completed and ready for delivery of possession to the purchaser. Nothing in the context of section 6.07 permits the withholding of the progress payment.
>
> I Under the above circumstances, we have no alternative but to continue with the payment as long as the Developer meets with the requirements of release.

[15] Subsequently, on two further occasions on 23 March 1987 (exh. P7) as well as on 7 May 1987 the developers issued notices of progress payments to the defendants. The first notice for the sum of RM55,125 was in relation to item (e) in the schedule, on commencement of brick walls of the premises; and the second, for the sum of RM91,875 was in relation to item (g), on commencement of electrical wiring and plumbing. The defendants withheld both payments on the basis of an indemnity from the plaintiff to the defendant "against any loss actions or litigations that may arise as a result of withholding of progress payments". The housing project was abandoned in June 1987.

[16] Subsequently, the defendants issued the following letters of demand to the plaintiff:

(i) A letter dated 10 June 1992, through their solicitors, M/s. Reddi & Co for the sum of RM61,556.45;

(ii) A letter dated 19 April 1993 through the abovementioned solicitors for a sum of RM143,003.03; and

(iii) A letter of dated 23 December 1997 through their solicitors, M/s. Syed, Paul & Co. for a sum of RM174,019.68.

[17] The plaintiff made no payments pursuant to the abovementioned letters.

[18] On or about 30 March 1998, the defendant issued a letter to the plaintiff terminating the plaintiff's licence to occupy the properly under the deed of assignment on the grounds that the plaintiff had defaulted on the payment of RM173,994.64. (exh. P9).

[19] Thus the plaintiff claims:

(a) A declaration that;

(i) the assignment is terminated and has therefore come to an end as a result of the defendants' unlawfully terminating the licence thereunder on or about 30 March 1998;

(ii) no monies are due and owing by the plaintiff to the defendants.

A (iii) An order that the defendants do all acts necessary to vest legal and beneficial title of the property known as Hibiscus Unit No. H-13 B, Level 5, Taman Kelab Ukay, Kuala Lumpur on the plaintiff.

B (b) Costs.

Issues

[20] The issues raised may be summarized as follows:

C (i) Whether the defendant's release of the progress payment of RM73,250 on or about 19 December 1986 to the developers was in breach of any express or implied terms in the loan agreement?

D (ii) Whether the defendant in making the abovementioned payment had acted negligently?

(iii) Whether the S & P between the plaintiff and the developer had been terminated?

E (iv) Whether the defendant's termination of the plaintiff's licence to occupy the property under the deed of assignment by a letter dated 30 March 2008 was lawful?

The Plaintiff's Contention

F **[21]** The plaintiff's contention is that the following terms should be implied in the loan agreement between the plaintiff and the defendant:

(a) the defendant when advancing monies to the developer was G acting in the capacity as the agent or on behalf of the plaintiff;

(b) the defendant when advancing monies to the developer is under an obligation to act in accordance with the mandate of the plaintiff;

H

(c) the defendant when advancing monies to the developer is under a duty to exercise reasonable care and skill to ensure that the amount claimed was due and payable to the developers.

I

[22] The plaintiff contends that the defendants' disbursement of the sum of RM73,250 to the developers on or about 19 December 1986 in disregard of the plaintiff's telex and a subsequent letter from the plaintiff's solicitors was a breach of the express and implied terms of the loan agreement. The defendant had also acted with negligence for the following reasons:

(i) The defendants failed to consider that as time was of the essence of the sale agreement, the plaintiff was entitled to terminate the S & P as the developers had not delivered vacant possession to the plaintiff on or before 29 November 1986.

(ii) The defendants failed to consider that any delay in giving possession to the plaintiff beyond 29 November 1986 amounted to a breach of the S & P by the developers.

(iii) The defendants failed to independently determine whether or not the progress of the works were such that the developers were in fact ready to commence works on the reinforced framework of the complex and the premises.

(iv) The defendants knew or ought to have known that on or about 20 November 1986, the developers had only completed 25% - 40% of the works, and at that stage was not able to deliver vacant possession of the property to the plaintiff on or before the due date of 29 November 1986.

[23] As a result of the defendants' negligence and/or breach of the loan agreement, the plaintiff is not liable to pay to the defendants the sum of RM73,250 whether with or without interest or any part thereof.

[24] The plaintiff further contends that as the plaintiff has not defaulted under the loan agreement, the defendants' termination of the plaintiff's licence to occupy the property, by a letter to the plaintiff dated 30 March 1998 was unlawful and amounted to a repudiation of the assignment which the plaintiff accepts.

The Defendants' Contentions

[25] The defences raised against the plaintiff's claims may be summarized as follows:

(1) No breach of loan agreement

[26] The defendant argue that the disbursement of RM73,250 by the defendants to the developers on 19 December 1986 was not in breach of the loan agreement on the following grounds:

Clause 1.2 of the loan agreement provides thus:

> The lender (defendant) shall release the housing loan to the borrower (plaintiff) or to the vendor (developer) at such amount and times as the lender may reasonably deem fit. Notwithstanding that there is a dispute between the borrower (plaintiff) and the vendor (developer) for the purpose of this clause the borrower(s) hereby give(s) his/her/their express consent to the lender to release the housing loan to the vendor in the manner and at the times specified in the sale agreement.

[27] The defendants' contention is that the use of the word "shall" in the abovementioned clause makes it mandatory for the defendants to make payments to the developer notwithstanding any dispute between the plaintiff and the developer.

[28] The manner and times of payment have been stipulated by ss. 4.03, 4.04 and 5.36 of the loan agreement. Taken together they require that first, payments be supported by a certificate of the developer's architect or engineer, which certificate is conclusive of works done; second, that payments be made within fourteen (14) days of receipt of a notice from the developer; third, strict compliance with the period to be adhered to pursuant to cl. 4.04, "Time shall be of the essence of the contract in relation to all the provisions of this agreement particularly those which relate to the payment of any installment of the purchase price ... "

[29] Further, it is contended that the manner and times of disbursement is within the discretion of the defendants as the phrase "as the lender (defendants) may reasonably deem fit" refers to a subjective standard of reasonableness as opposed to an objective standard of reasonableness.

[30] The defendant's submission is that in releasing the sum of RM73,250 to the developer, in response to a notice of payment accompanied by a certificate by the developer's architect on the commencement of works, the defendants had acted in accordance with the terms of the loan agreement. The defendants referred to

the cases of *Citibank N.A. v. Ooi Boon Leong & Ors* [1980] 1 LNS 168 FC and *Bangkok Bank Bhd. v. Chuan Kee Company Sdn. Bhd.* [2000] 1 CLJ 766 HC as authorities.

[31] The defendant refutes the existence of a principal-agent relationship between the plaintiff and the defendant. The principal-agent relationship subsists as between a bank and its customer and is to be distinguished between that of a lender and a borrower. *Joachimson v. Swiss Bank Corporation* [1921] 3 KB 110 was cited as authority.

[32] The defendant also relies on cl. 1.2 of the loan agreement which provides that notwithstanding any dispute between the plaintiff and the developer, the plaintiff had given his express consent to the defendant to release the installments on the housing loan to the developer in accordance with the terms thereof.

[33] The defendant submits that the plaintiff is bound to pay the amount released by the defendant to the developer and the plaintiff has defaulted. In the circumstances the defendant submits that the plaintiff's licence to occupy the property under the deed of assignment had been lawfully terminated by the defendants.

(2) No Negligence

[34] The defendant contends that in order to establish negligence, the plaintiff must prove the following elements:

(i) that there was a duty of care owed by the defendant to the plaintiff;

(ii) that the defendant had breached that duty of care;

(iii) that the breach had caused the plaintiff to suffer losses;

(iv) that the plaintiff's loss was not too remote.

[35] The defendant's contention is that in making the abovementioned disbursement, the defendants had not acted negligently. The defendant owes no duty of care to the plaintiff, other than a contractual duty dictated by the terms of the loan agreement. Even if there is such a duty, the plaintiff has not breached that duty in that the defendant had taken the following measures:

(i) conducted site inspection of the project where the plaintiff's house was situated;

(ii) visited the developer at their site and business office; liaised with the developer to ensure that the developer complies with the provisions on liquidated damages;

(iii) sought legal opinion on the release of the RM73,250

[36] The standard of due care is the subjective standard of whether the defendant had exercised due care, which the defendant had satisfied by taking the abovementioned measures. Thus the defendant contends that were there such a duty, it had discharged its duty of care.

[37] The defendant further submits that the losses suffered by the defendant were not foreseeable. At the material time when the sum of RM73,250 was released to the developer, it was not foreseeable that the housing project would be abandoned by the developer. It was also contended that the defendant could not foresee that the recall of the loan agreement and the termination of the licence to occupy the said premises would cause losses to the plaintiff.

(3) Lawful Termination Of Licence To Occupy Property

[38] As the defendant had made payment in accordance with the terms of the loan agreement, and with the exercise of reasonable care, the default of the plaintiff to reimburse the defendant entitled the defendant pursuant to cls. 3 and 4 of the assignment to terminate the plaintiff's licence to occupy the property under the deed of assignment.

Decision

[39] At the trial, both parties had one witness each. The plaintiff himself was the sole witness for the plaintiff's case. The defendant's sole witness was Mr. Ong Teck Hock, a Branch Manager of the defendant.

[40] After a careful consideration of oral testimonies of witnesses, oral as well as written submissions of plaintiff and defence counsels and relevant authorities, the decision of the court is as follows:

On Issue Of Breach Of Contract

[41] The defendant's payment to the developer in the sum of RM73,250 on 19 December 1986 was in breach of the express terms of the loan agreement between the plaintiff and the defendant.

[42] The abovementioned payment was in breach of cls. 1.2, 4.0 and, 4.04 of the agreement, the terms of which are reproduced below:

According To Clause 1.2

... The lender (defendant) shall release the housing loan to the borrower... in the amount and at times specified in the sale agreement.

Clause 4.0

The balance of the purchase price shall be paid by the purchaser to the developer by installments of such amounts and at such times as are set out in the schedule of payment annexed thereto.

Clause 4.03

Time is of the essence of the contract

[43] The payment of RM73,500 was made by the defendant on 19 December 1986. This was three weeks after the expiry of the date of delivery of vacant possession on 28 November 1986. In addition the architect's certificate that accompanied the developer's request for payment had certified that only 25% - 40% of works on the property had been completed. The defendant at the time payment was made was aware first, that it was after the expiry of the date of vacant possession and second, there was clear documentary evidence that the developer was in breach of the S & P in not adhering to the schedule of payments that was annexed to the S & P. Payment by the defendant was clearly against cl. 1.2 and 4.0 which stipulate that:

The balance of the purchase price shall be paid by the Purchaser to the Developer by installments of such amounts and at such times as are set out in the Schedule of payment annexed thereto.

[44] It has been suggested by the defendant that the defendant owed conflicting duties-to the developer to make payment on receipt of notice of payment, notwithstanding any dispute between the plaintiff and the developer; and a duty to the plaintiff, his customer who had requested that payment be withheld.

[45] I do not see any conflict. Clause 1.2 of the loan agreement between the plaintiff and the defendant stipulates that the release of payment was to be:

> ... in the amount and at times specified in the sale agreement.

[46] It is clear that the defendant's duty to make payment to the developer is not absolute in that every demand from the developer must be complied with, but rather conditional on the demand being made " ... in the amount and at times specified in the Sale Agreement".

[47] Thus the payment of RM73,500 made by the defendant to the developer on 19 December 1986 was payment made in breach of the express terms of the loan agreement between the plaintiff and the defendant it is also evident that at the time the above payment was made to the developer, the developer was already in breach of the S & P as the date of delivery of vacant possession had already passed.

Payment Without Mandate

[48] What is the relation between the defendant bank and the plaintiff in the matter of disbursing the loan installments? Is it one of debtor and creditor or principal and agent? Has the defendant breached his obligation to the plaintiff?

[49] In the case of *Hoo See Sen & Anor v. Public Bank & Anor* [1988] 1 CLJ 768; [1988] 1 CLJ (Rep) 125. The appellants had obtained a loan of RM100,000 from the first respondent in order to finance the purchase of a two storey link house from the second respondent. The appellant assigned the benefits under the sale and purchase agreement to the first respondent as security for the loan. The first respondent gave an undertaking to the second respondent that it would pay any monies due from the appellant under the sale and purchase agreement. The appellants brought an injunction to restrain the first respondent from paying the second respondent the balance of the purchase price on the grounds that the second respondent owed the appellants a larger

sum on account of liquidated damages for late delivery of vacant possession. The injunction was refused in the High Court. On appeal the Supreme Court allowed the appeal.

[50] Salleh Abas LP, (delivering the decision of the Supreme Court) said:

> ..., indeed the position of the first respondent in the matter of disbursing the loan is in the capacity of an agent of the appellant the first respondent is bound to release the money only when authorized to do so, and this must be for the benefit of the appellants.

[51] Further authority for the proposition that a bank in transferring funds to a third party on the instructions of his customer is bound to comply with the instructions of its customer can be found in the case of *Libyan Arab Foreign Bank v. Bankers Trust Co.* [1988] 1 Lloyd's Rep. 259. In the aforementioned case the failure of the bank to act on the instructions of the customer with regard to the transfer of funds was held to be a breach of contract for which the bank was liable.

[52] Further, it has been held by the Federal Court in the case of *Abdul Rahim Abdul Hamid & Others v. Perdana Merchant Bankers Bhd. & Ors* [2006] 3 CLJ 1, that it is an implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care in and about executing customer's orders.

[53] When the defendant made payment to the developer on 19 December 1986, the defendant was acting in the capacity of agent of the plaintiff and was clearly under an obligation to act in accordance with the instructions of the plaintiff. The plaintiff had on 28 November 1986 sent a telex to the defendant to withhold payment. The plaintiff solicitors' letter dated 5 December 1986 reiterated the defendant to stop payment. Thus when the defendant made payment to the developer contrary to the express terms of the agreement as well as the written instructions of the plaintiff, the payment was made without mandate or unauthorized.

On The Issue Of Negligence

[54] Numerous authorities have laid down that banks owe a duty to take reasonable care in the performance of its duties towards its customers. (*Joachimson v. Swiss Bank Corporation* [1921] 3 KB 110; *London Joint Stock Bank Ltd. v. Macmillan and Arthur* [1918]

AC 777; *Burnett v. Westminster Bank Ltd.* [1966] 1 QB 742; *Tai Hing Cotton Mill v. Liu Chong Hing Bank Ltd.* [1986] AC 80). It is however impossible to provide an exhaustive list of the duties of care owed by the banker and customer as the issue is to be determined in the context of the particular transaction between the banker and the customer, as well as the standard of reasonable care that applies in the particular circumstances of the case. Does the defendant bank owe a duty to the plaintiff to take reasonable care in releasing payment to the developer? If there was such a duty, has the defendant breached its duty of care to the plaintiff?

[55] Did the breach cause damage or harm that was reasonably foreseeable to the plaintiff?

[56] It has been contended by the plaintiff that the lack of reasonable care of the defendant lies in making payment to the developer in disregard of the knowledge that the developer would not be able to deliver vacant possession of the property as scheduled and agreed to in the S & P. Has the defendant discharged its duty of care in the circumstances?

[57] The defendant's sole witness testified that the defendant had taken the following precautions between 5 December 1986 - 19 December 1986: sought independent legal advice, made a site visit to check on the progress of the works and liaised with the developer.

[58] There is no documentary evidence tendered by the defendant to support its contention that the defendant had sought independent legal advice before releasing the payment of RM73,250 on 19 December 1986. From the testimony of the defendant's witness, it is not clear if such a visit was made as there was no report of such visit exhibited, neither was the plaintiff informed of such visit. In any case, I find the visit unnecessary. I do not consider it incumbent on the defendant to make a site visit to verify the status of the project. In my opinion the imposition of such a duty on lenders like the defendant would be too onerous. The architect's certificate that accompanied the developer's demand for payment had certified that the stage of completion was only between 25% - 40% and that certification is sufficient proof of the stage of completion, without a need to make a site visit for verification.

[59] While there was such a duty on the part of the defendant to exercise reasonable care and skill in disbursing the loan installment to the developer there is insufficient evidence for the court to find conclusively that the defendant had breached its duty of care to the plaintiff. Thus I do not find it necessary to consider further what harm or damage was caused to the plaintiff and if such damage was reasonably foreseeable to the defendant.

[60] I therefore make no determination on the negligence of the defendant.

On Deed Of Assignment

[61] Under the terms of the deed of assignment, (hereinafter referred to as the 'deed') the defendant is entitled to exercise remedies which include a right to take possession of the property if the plaintiff has defaulted on all or any balance of purchase price. Since the defendant's claim against the plaintiff is in respect of the sum that had been paid out without mandate, there is no obligation on the plaintiff to repay. Thus the plaintiff cannot be regarded as being in default. In consequence thereof, the plaintiff's letter to the defendant, dated 30 March 1998, wherein the defendant gave notice of termination of licence amounts to a repudiation of the deed. This repudiation can be construed as the plaintiff exercising its election to terminate the deed. Consequentially, legal and beneficial title of the property known as Hibiscus Unit No H-13 B, Level 5, Taman Kelab Ukay Kuala Lumpur should revert to the plaintiff.

[62] Based on the aforementioned grounds, the court grants the following relief prayed for by the plaintiff:

(1) A declaration that;

(i) the assignment is terminated as a result of the defendant's unlawful termination of the defendant's licence to occupy the property on 30 March 1998.

(ii) No monies are due and owing by the plaintiff to the defendant;

A (2) An order that the defendant do all acts necessary to vest legal and beneficial title of the property known as Hibiscus Unit No H-13 B, Level 5, Taman Kelab Ukay, Kuala Lumpur on the plaintiff.

B (3) Costs.

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